LATERAL SHORELINE ACCESS

IN

RHODE ISLAND

FINAL REPORT

OF THE

SPECIAL COMMISSION TO

STUDY ACCESS ALONG

THE SHORELINE

-1980-

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

FINAL REPORT

OF THE

SPECIAL LEGISLATIVE COMMISSION

TO STUDY LATERAL ACCESS

ALONG THE SHORELINE OF RHODE ISLAND

State House
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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

LATERAL ACCESS COMMISSION

1979 - 1980

John A. Lyons, Chairman
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Maurice J. Loontjens, Jr.
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TO THE HONORABLE GENERAL ASSEMBLY:

The Special Legislative Commission to Study the Lateral Access Along the Shoreline of Rhode Island is pleased to submit its report in compliance with Provisions of House Resolution #79H6171 Sub A of the January session, 1979.

Legislation to implement this Commission's recommendations accompanies this report and will be introduced by Assembly members who participated in the study.

The Commission is appreciative of the opportunity to be of assistance to the General Assembly, and trusts that its findings and recommendations will benefit legislators in their deliberations.

Respectfully,

John A. Lyons

John A. Lyons, Chairman

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I. INTRODUCTION

There are two basic elements of the beach access problem. One is establishing the public right to use the beach or a portion thereof. Most states, including Rhode Island, have established the public ownership of the beach below the mean high water mark, and therefore, the right of public use below that line. Most of the shoreline in the United States above the mean high water mark has been held in private ownership. This raises the second element of the problem. To reach and use the public portion of the beach, the recreational user is faced with passing over private land without trespassing. Provision of public access walkways leading from the street to the public shoreline would greatly expand the use of the public portion of the beach.

A number of states, either legislatively or judicially, have responded to the ownership and access problems by opening up beach areas to the public. Both Texas and Oregon, by legislation, have clarified which portion of the beach that is in the public domain. The Oregon Open Beaches statute declares that the beach area to the vegetation line is in the public domain.[1] Texas has passed legislation that created a presumption that all beach area to either the vegetation line or to 200 feet above mean low water belong to the public.[2] Some of the legislation in this area has been prompted by innovative judicial decisions, and a number of statutes have been clarified or limited in scope by the courts. The Hawaiian Supreme Court has held that all beaches up to the vegetation line are owned by the State[3] and courts in California[4] and Florida[5] have held that the public right to use the beach may extend to the vegetation line if specific conditions are met. While these state actions have gone a long way toward defining the public area of the beach, the problem of gaining

access to this area still remains. Oregon has complemented its Open Beach legislation with an extensive park development program. Other states have begun programsto identify and provide beach access roads and parking facilities along the coast similar to the right-of-way program of the Coastal Resources Management Council.[6] South Carolina has used state and federal funds to complete a beach access plan of park land purchase and provision of public accessways.[7]

The federal government has also been active in the beach access field. This has taken the form of direct acquisition of beach areas by the federal government, or through federal grant programs such as the Land and Water Conservation Fund[8] that provides funds to the states for the purchase of recreational shoreline. Several bills have also been introduced in Congress to provide federal aid to the states to determine public rights to the beach. None of these "open beaches" bills have been enacted. However, a 1976 amendment to the federal Coastal Zone Management Act does require each coastal state to include a beach access planning element in their coastal program, and provides funds for acquiring access to beaches.[9]

The main initiative in the access area will come from the individual states. In some cases, it may be accomplished by legislation; in other cases, it will be the result of a decision by the judiciary in that state. Whether the initiative is legislative or judicial, or a combination of both, its legitimacy must be evaluated by the unique political and legal framework of that state. At the same time, important lessons can be learned from the experience of other states.

In recognition of the importance and tradition of beach use in Rhode Island, and in consideration of its role as the prime determinant of public policy, the Rhode Island legislature decided to review the issue lateral access by the public along the shoreline of the State.

II. ORGANIZATION AND BACKGROUND OF THE COMMISSION

Legislative Authority. The Special Legislative Commission to Study Lateral Access Along the Shoreline of Rhode Island was established by action of the General Assembly at the January session, 1979, through Resolution 79H6171 SUB A. Terms of the Resolution provided (a) that the Commission consist of five members, (b) that the purpose of the Commission be to "study the entire subject of lateral access along the shoreline of Rhode Island," and (c) that the Commission report its findings and recommendations to the House of Representatives on or before March 4, 1980. (See Appendix A for the Resolution itself). The Commission's report completes its responsibilities in accordance with the terms of the Resolution.

Membership of the Commission. The commission consists of five members: the chairman of the Coastal Resources Management Council, John A. Lyons, who serves as chairman of the Lateral Access Commission; Rep. Francis A. Gaschen, the designee of the Chairman of the General Assembly's Joint Committee on the Environment; Maurice A. Loontjens, Jr., the representative of the Rhode Island League of Cities and Towns, and Chairman of the Narragansett Town Council; Robert Randall, the representative of the Rhode Island Sports Fisherman League; and James Ibbison, the representative of the Rhode Island Mobile Sports Fishermen.

Meetings and Hearings. During the course of its study, the Commission held a total of five meetings. Testimony was given by various individuals: a representative from the Town of Narragansett; a representative from the Rhode Island Mobile Sports Fishermen; a representative of the Rhode Island Sports Fishermen's League; the Chairman of the Coastal Resources Management Council's subcommittee on beach rights-of-way; and legal experts on public beach access on a national and State level.

Acknowledgements. The Commission operated throughout the period of study without full-time staff. However, it did utilize the services of

Francis X. Cameron, Associate Professor of Marine Affairs, and expert in the field of coastal law, and Dennis H. Esposito, of the firm of Goldman and Biafore, legal counsel to the Coastal Resources Management Council. The Commission also thanks Ms. Margaret Davidson, Esq., who conducted background research for this study, and Ms. Lois A. James, the stenographer who recorded the minutes of the Commission meetings.

III. OVERVIEW OF THE APPROACHES OF OTHER STATES

In ascertaining exactly what rights of public ownership and use exist in the beach area, it is critical to define several distinct portions of the beach:

1. the "wet sand" - the area between mean low tide and mean high tide ("foreshore" and "tideland" are generally synonomous with this term);

2. The "dry sand" - the area between mean high tide and the line of vegetation, an area inundated by water only during severe storms; and

3. the "upland" - that area landward of the vegetation line.

The public's right of use may differ greatly depending on which area of the beach is involved. Therefore, boundaries between the areas must be capable of precise definition. The leading Federal case, Borax Consolidated, Ltd. vs. City of Los Angeles[10] established the rule that the line of mean high tide delineates the wet sand from the dry sand area, and that the mean high tide line is equal to the average of all high tides measured over an 18.6 year cycle. Although it is important to delineate this boundary exactly, in practice it is very difficult to accomplish. The magnitude of the rise and fall of the tide varies from day to day and tidal characteristics derived from daily observations may differ considerably from the average or mean values over a long period of time. Therefore, the average must be based on long-term observations before it can be considered an accurate value for the tidal datum. In addition to this difficulty, tidal boundaries are ambulatory. The physical location of the mean high water line may shift because of natural or artificial changes in the location of the shoreline due to accretion, erosion, reliction or avulsion. The general rule is that gradual and imperceptible changes in the mean high water mark shift the boundary line accordingly. Therefore, it is important to

determine where the line is at any one point in time. Some states, such as Florida, have undertaken systematic long-term programs to establish and map exact tidal boundaries.[11] However, this is expensive and time consuming. Unfortunately, attempts to avoid this process by establishing some type of fixed but arbitrary boundary along the coast have been declared unconstitutional by the United States Supreme Court.[12] Therefore, some other legal concept must be used to mitigate the difficulty of establishing an exact boundary line.

A. JUDICIAL APPROACHES

There are basically three legal concepts that have been used by the courts to establish public use and access to beach areas: custom, implied dedication, and prescriptive easements. Custom has only been used in one coastal state - Oregon. The Hays' owned a tourist facility at Cannon Beach, Oregon, which they thought included a dry sand beach. When they attempted to construct fences to enclose their dry sand area, the State of Oregon brought suit to enjoin them from constructing the fences. The Oregon Supreme Court in an extremely broad ruling, not only found a legitimate right of public use for the beach in question, but also that the doctrine of custom established the right of public recreational use for all dry sand beaches in the State.[13] The doctrine of custom was developed in England and holds that where there has been a very long and common use of a defined area, that use becomes a recognized property right. There are seven requirements that traditionally have to be met before the public has a customary right:

1. The use must be ancient - so long that nobody remembers otherwise;
2. the use was not interrupted;
3. the use was peaceable and free from dispute;
4. the use was reasonable and in keeping with the character of the land;
5. there was certainty as to what land was used;
6. the custom must be obligatory; that is, the public's right has never been questioned; and
7. the use was not violative of the general law.

The Oregon Court found that the public had used the dry sand portion of the beach since the beginning of the State's political history and such use had become a customary right. Several points are worth noting in reference to the use of thes doctrine in Rhode Island:

1. There is much dispute over whether the above seven criteria were really satisfied in this case.

2. The doctrine of customary rights has been little used anywhere in the United States.

3. Beach use in Oregon does have a unique history; there was little development before 1960, and most tax assessors did not include the dry sand portion of the beach as part of an upland owner's property.

4. The court did intend to apply the Doctrine to the entire state's coastline to avoid case-by-case litigation; however, a private property owner can still bring an action saying that their land was not customarily used, but the burden is on the land owner to show that this is not true.

5. This Oregon case has been reinforced by legislation that states a legislative preference for public rights over private rights which can be used in doubtful cases and which establishes the engineering equivalent of the vegetation line.[14]

The two other legal concepts that have been used to open private beaches to public access - implied dedication and prescriptive easements - are basically one and the same and shall be discussed together. Two cased from California, Gion vs. City of Santa Cruz and Dietz vs. King [16] are outstanding examples of the use of the implied dedication concept. The California Supreme Court held that where the public has used a beach for a period of five (5) years or longer, with the full knowledge of the owner and without asking permission to do so, the public use ripens into a public easement. The owner's inaction is evidence of his acquiescense in public use and thus of his intent to donate the land. Dedication implied from public use has frequently been employed to create roadway easements, but these two cases have become the hallmark of the trend towards allowing implied dedication in beach access cases. However, the first use of the doctrine was in a Texas case, Seaway Co. vs. Attorney General.[17]

In this case, the Seaway Company attempted to prevent the public from reaching state-owned tidelands. The Court found that for over a century the public has used the dry beach freely for recreation. No one had ever interfered with public enjoyment of the area, and the public had never sought permission

from anyone to use the beach. The Court found this evidence sufficient to support an implied dedication. In cases of implied dedication, the owner may show that he did make efforts to exclude the public, and therefore to show that he did not want to give his land away. However, these must be more than just occasionally posting a no trespassing sign. They must be effective attempts to exclude the public. One negative by-product of the Gion and Dietz cases was the move by many California landowners to effectively fence their property off, thus eliminating many beach areas that were previously open to the public:

> On the Palos Verdes peninsula in Los Angeles County, major land owners have recently erected a 7-foot high fence topped by three strands of barbed wire in order to keep the public from reaching the beach by crossing their property. It is believed that other owners in that area have dynamited paths leading to the water.. In Orange County, one land owner has erected a large fence with cactus planted at its base to discourage barefoot access to the beach over his property. Land formerly used for parking and beach access in San Mateo County is being vigorously plowed to deter unauthorized users. Parts of Sonoma County are beginning to look like beaches of Normandy in 1944, complete with tank traps: automobile transmissions have been planted in the ground to stop vehicular access.[18]

In addition to this potential negative effect, many question the equity of the implied dedication/prescriptive easement approach. The "taking" of property without just compensation is avoided due to the finding that the landowner "gave or donated" his land to the public. This may be even more inequitable when the dedication occurred years before the present owner acquired the land. Unlike custom, implied dedication and prescriptive easements must be used on a case-by-case basis, and this can result in the lack of uniform treatment of beachfront property owners.

B. LEGISLATIVE APPROACHES

In an effort to either encourage a finding of public rights in private beaches, or in recognition of the fact that the legislature, rather than the courts, is the proper forum to set public beach access policy, a number of states have enacted legislation in this area. One approach is to establish public rights to the beach or to at least create a statutory presumption which favors public rather than private use. A leading example is the Texas Open Beaches Act.[19] The Act creates several presumptions and instructs the state attorney general to enforce them. It creates a presumption that the public enjoys a prescriptive easement to use the area between the mean low tide and the line of oceanfront vegetation, or if there is none, the line two hundred feet landward of the mean low tide. It also creates the presumption that title to littoral land does not entitle its owner to exclude the public from using this part of the beach of the part below. Both of these can be overcome on a sufficient showing of facts by the landowner that no prescriptive right exists. The Act also creates a presumption that the public has a prescriptive easement for purposes of ingress and egress to beaches owned by the state and to beaches over which the prescriptive easement extends. However, it does not create a right or presumption for the public to cross the uplands landward of the vegetation to reach the beach. Depending on the amount of access available in a state across the uplands, a state may want to consider presumptions on the public right to use the uplands for access purposes.

It should be emphasized here that the Texas statute attempts to avoid the unconstitutional taking issue by only creating a presumption of the public right, and not an unqualified public right. There is some disagreement over whether such presumptions are constitutional. This hinges on whether there is

a rational connection between the fact that there is an open sandy beach and the fact that the public has some sort of right in that beach area. To avoid pressing this issue, the Attorney General's Office in Texas bases their cases on extensive public use rather than on the presumption. In this regard, the Attorney General has assigned three full-time attorneys to prosecute beach access cases. Proving dedication or prescription is a difficult task, requiring much investigation and large sums of money. The State must determine what use the public has made of the beach in the past, secure ancient documents to show the beach has been used by the public for many years, and obtain witnesses to testify as to the nature of that use. The primary function of the Attorney General's Office is to bring actions to determine whether in fact the public has acquired rights to the beaches. If a private landowner contests the public right to use the beach, the Attorney General must introduce the same concrete proof required in proceedings without the presumption. In effect, the State cannot win just on a presumption. This has generally held true in the case of the Virgin Islands Statute that also creates a presumption of public use.[20]

Other Legislative approaches include:

1. Public access acquisition programs such as Florida's Beach and Shore Preservation Act,[21] these involve quite a bit of expense; however, with proper planning, strategic access areas in each part of the state can be obtained with limited funds; in addition, aggressive and strategically planned programs to encourage land owners to donate access in return for property and income tax benefits have also been used successfully.

2. State enabling legislation has been enacted in several states to require the dedication of public pedestrian or vehicular access to the beach front development.

IV. THE PRESENT STATUS OF THE LAW IN RHODE ISLAND

Of the three legal theories used by other courts to establish public beach rights in the dry sand area, implied dedication and prescriptive easements do have life in Rhode Island case law. However, there is little, if nothing, in the State's legal tradition to support the customary rights doctrine that was used in Oregon. A similar argument may be used as one aspect in a concerted effort to expand public access in Rhode Island. This will be discussed in Section II B.

There have been few cases in Rhode Island that have dealt with the question of a prescriptive easement for beach access, and all of these cases have ruled in the negative on the establishment of such an easement. Instead, the Rhode Island Courts have generally preferred to use the doctrine of implied dedication. In Daniels vs. Blake[22] the Rhode Island Supreme Court found that is is possible for the public to establish a prescriptive easement by use over the required time period, but required an extremely heavy evidentiary burden to establish the easement. The requirements are similar to other jurisdictions: general, continuous and adverse use for a period of twenty (20) years. In Daniels, the Court found that the use had only been seasonal and occasional, and only by a few people living in the neighborhood. Moreover, the Court indicated that Section 34-7-4 of the Rhode Island laws prohibited a prescriptive easement in the form of a footway from being established. For an easement for a footway to be found, it must be in connection with the right to pass with carriages! This would indicate that a footpath to the beach would have to be established in connection with a road used by automobiles. In addition, the Court also relied on the language from a case on Block Island to find that an

access way over private property to the wet sand would be presumed to be permissive, and not adverse to the owner. This would defeat the easement. In Town of New Shoreham vs. Ball[23] the Court stated that:

> "nothing is more common in Rhode Island than for people to cross land lying along the bay to get to and from the shore, and it would hardly be possible for any occupant of such land to prove title by adverse possession if such crossing would suffice to interrupt it."[24]

The inference that the Daniels Court drew from this statement was that access to the shore is largely permissive, thus making it difficult to establish the adversity necessary for the easement. Interestingly enough, the same language in New Shoreham could be used to support an argument for customary rights in the public for access to the shore.

As far as implied dedication in concerned, the Rhode Island Supreme Court, in Talbot vs. Town of Little Compton[25] found that a beach front owner had dedicated his property to the public based solely on long and continuous adverse use. The intent of the owner to dedicate may be inferred from the silence of the owner in the face of adverse public use. As in the California cases, the posting of "private property" signs some years after public use had begun was not sufficient to rebut the inference of dedication.[26] In Talbot the Town inhabitants came in great numbers to hunt, fish and bathe on the shorefront property over a long period of time. No attempt was made by the owner to exclude the Town residents from the beach, although a fence was erected at one time and later removed by the public. Implied dedication does have a basis in Rhode Island law and could be used affirmatively in connection with a statute similar to the Texas Open Beaches Act. This will be discussed in Section II B.

In Rhode Island, the State holds title to the foreshore and all land below the mean high water mark in trust for the public to preserve the rights of

fishing, navigation, and commerce.[27] Any questions of public access to and use of the foreshore must be interpreted in light of Article I, Section 17 of the Rhode Island Constitution (as amended), which essentially incorporates the common law public trust doctrine. This clause provides that:

> The poeple shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this State.

The leading case on what is meant by "privileges to the shore" is Jackvony vs. Powell.[28] In this case, the Court found a right of public passage along the shore of Easton's Beach in Newport. The Court in this case prohibited the upland owner from erecting a fence that would prevent the public from lateral passage along the shore. It is important to note that "shore" in the context of the Rhode Island Constitution refers to the wet sand portion of the beach. Since there was no previous Rhode Island decision on shore privileges, the Jackvony Court relied on generalized ideas of custom and usage. In addition, the Court was willing to look to the historical evidence provided by the judicial decisions in other states, particularly New England states.[29] In addition to the right of passage along the shore, the Court also mentioned the right of fishing from the shore, the right to take seaweed, and the right to go from the shore into the sea to bathe. Although the right of passage along the shore is by inference limited to "the space between the high and low water mark" the next section will explore the possibility of expanding the "privileges to the shore"[30] to include access over the dry sand.

V. FINDINGS

The State has two basic options for addressing the public access question. The first would be to seek a declaratory judgment from the Rhode Island Supreme Court as to what exactly is meant by the term "privileges to the shore." The State could put forth its best argument as to why this term should include access over the dry sand portion of the beach. This approach could be reinforced by some type of legislative pronouncement to the effect that it was the public policy of the State to expand beach access. The second option would be to establish by legislation a presumption of public use and access rights in the dry sand portion of the beach.

Option one, the expansion of the "privileges to the shore" by the Rhode Island Supreme Court would have the decided advantage in insulating the state action from the taking issue (subject to one caveat discussed below). State authority to regulate the use of the coastal zone derives from its police power. However, this power must be exercised within the limits of the State and Federal Constitutions. Both prevent the government from the taking of private property for public use without just compensation. Any state legislation that would deprive a landowner of all or part of his property is subject to a constitutional challenge under the so-called "taking clause."[31]

The judicial option would avoid this challenge based on the interpretation that "privileges to the shore" not only now includes access over the dry sand, but has always included this right. Therefore, nothing has been "taken" from the private property owner. However, one possible problem is prevented by the United States Supreme Court ruling in Hughes vs. Washington.[32] The concurring opinion in Hughes very strongly stated that the State Supreme

Court in interpreting the application of the Washington Constitution to a beach front owner could not use the simple device of asserting retractively that the property it has taken had never existed at all. The key is whether the state court's ruling was a sudden and unpredictable change in terms of prior judicial opinions. In the Hughes case, there was a completely opposite state court decision twenty (20) years earlier. In the Rhode Island situation, at least the Jackvony decision was silent on whether "privileges to the shore" included access over the dry sand. Thus, it could be argued that this point was never decided and would not constitute an "unpredictable and startling" change in state law. Other arguments on the basis of Hughes being applicable at all to Rhode Island as one of the original 13 colonies and on the deference due to state court decisions on property rights could also be advanced. This first option also frees the issue from partisan politics, with the onus being on a "neutral" body, the Rhode Island Supreme Court.

The definition of "privileges" must rest on historical analysis. Although access to shore areas may be provided by "particular custom", "express grant" or "public highway", there doesn't seem to be a general right of access that can be derived from the rights exercisable on the shore once one has arrived. As one learned treatise states:

> Both commerce and fishing, therefore, and bathing in the sea, although they are matters favored by the common law, by reason of public and national benefits to be derived by them, do not, because the waters of the sea are open to all persons for all lawful purposes, afford a universal right of access to them over land which is private property.[33]

However, the argument could be made that the holding in Jackvony to the effect that passage along the shore is necessary for the enjoyment of shore rights, by logic also applies to passage over the foreshore. The experience of other states such as Oregon and their doctrine of custom, as

well as any developments in New England to this effect, could be used to support this argument. Recent New Jersey cases have adopted a modern approach to the application of the public trust doctrine.[34] They have found that "the public trust should be molded and extended to meet changing conditions and the needs of the public the doctrine was created to benefit."[35] In other words, the concept of privileges to the shore would mean nothing unless access over the dry sand was also afforded.

The availability of new judicial decisions from other states does not mean that the Rhode Island Supreme Court would expand the Jackvony decision. However, it is an idea worth considering. This option would best be implemented by having the state agency with responsibility for beach policy, the Coastal Resources Management Council, prepare a legal brief to be argued in the Rhode Island Supreme Court with the intent of settling the exact meaning of "privileges to the shore." This project would also encompass the drafting of any proposed legislation in support of expanded public beach access rights.

The second option would be to draft and adopt legislation similar to the Texas Open Beaches Act. This statute would use the Rhode Island Constitutional provision on "privileges to the shore" as the basis for the presumption of a public right to use all dry sand areas for access to the water. In order to avoid the taking issue, especially in the absence of any Rhode Island judicial interpretations that have found a general public right of access, the draft legislation could not be in the form of a blanket right of the public to use the dry sand. It should be noted that even in Texas, implementation of the statute has been confined to cases where the public use of a private beach has been excessive, thus making the best case for use of the statute. As noted earlier, this approach can be expensive. It also throws the entire issue into the political arena, although it is fair to argue that this is where it should be decided in the first place.

Modifications to this type of legislation that would seem to make it less offensive, also carry their own constitutional problems with them. Limiting access to certain uses could be challenged as a violation of the equal protection clause of the United States Constitution. Limiting application of the statute to only barrier beaches would also raise the same problem, although this may be sound legally on the rationale that there is a connection between these types of attractive beaches and greater use by the public in terms of implied dedication. Restricting access over the dry sand to certain times of the day would still run head on into the taking question. The State would still be depriving the property owner of exclusive use and disposition of his property. Limiting the time frame of access may lower the amount of money that the State would have to pay to acquire the access right, however.

A third option would be to use a less dramatic approach which would combine acquisition of strategic access points, continuation of the rights-of-way program, an agressive and concerted program to encourage the donation of easements, and the mandatory dedication of access rights in connection with waterfront developments.

45-23-4 of the Rhode Island Laws is broad enough to allow the community to require a subdivision exaction for access to the beach. The Rhode Island case law on subdivision exaction for recreational purposes allows any increased need for recreational space in the community due to the sub-division to be exacted from the developer.[36]

It is also possible that the community, in addition to requiring a dedication for public access, could require a dedication of part of the dry sand area of the beach itself. It is recommended that the state adopt legislation requiring provision for public access before any coastline or shoreline

subdivision is approved. This would allow the public to at least reach the foreshore for recreation.

Shorefront property owners should be encouraged to donate or sell public right-of-use easements to the state. Donation would bring a charitable deduction for federal income tax purposes and also a lower property tax evaluation. However, since the easement would involve public access, the cost of the easement may be as high as acquiring the entire property. The willingness of a property owner to donate or sell a public use easement to the state or municipality will, of course, revolve around how much aggravation the landowner thinks he will be getting involved in; e.g., crowds, litter, alcohol and drug use, and how much he values his right of privacy. This could be alleviated somewhat by assurance of careful governmental control to prevent abuse of the easement by providing for state policing and maintenance and insulation of the property owner from any liability due to injuries occurring at the beach.

RECOMMENDATIONS AND CONCLUSIONS

The Commission studied the approaches of other states on lateral beach access and the legal, political, socioeconomic, and administrative implications of these approaches. Based upon an analysis of these factors, and a review of the law in the State of Rhode Island, the Commission hereby concludes and recommends:

1. Rhode Island has long recognized the rights and privileges of its citizenry to the above. These rights and privileges have been held so fundamental that they are expressly provided for in the Rhode Island Constitution (Article I, Section 17).

2. Included in these rights and privileges to the shore is the right of lateral passage along the shore (Jackvony vs. Powell).

3. The nature and extent of these rights and privileges to the shore have never been completely addressed by the courts of this State.

4. In furtherance of the Constitutional mandate of Article I, Section 17, the General Assembly created the Coastal Resources Management Council as the principal mechanism for managing the State's coastal resources. Clear understanding of public access to these coastal resources is of paramount concern to this State.

5. Therefore, this Commission recommends to the Honorable House of Representatives to enact an amendment to Title 46, Chapter 23, of the General Laws of the State of Rhode Island authorizing the Coastal Resources Management Council to seek judicial clarification of the nature and extent of the constitutional guarantee of the people's enjoyment and exercise of privileges of the shore as they pertain to lateral access.

6. Further, once said clarification is made, to direct the Coastal Resources Management Council to exercise all remedies to which it has heretofore been empowered to preserve and protect these privileges to the shore.

FOOTNOTES

1. Ore. Rev. Stat. Secs. 390.610-.690 (1968)

2. Tex. Stat. Ann. Sec. 5415(d) (Vernon Supp. 1972)

3. County of Hawaii v. Solamura, 517 P2d 57 (1973)

4. Gion vs. City of Santa Cruz and
Dietz vs. King, 465 P2d 50 (1970)

5. City of Daytona Beach vs. Tona-Rama, Inc.
271 So.2d 765 (1972)

6. Rhode Island Coastal Resources Management Council,
Rights-of-Way Program

7. South Carolina Department of Parks, Recreation and
Tourism, Public Access and Recreation in South Carolina (1976)

8. 16 U.S.C. 460-(1)-5 (1965)

9. 16 U.S.C. 1451 (1972)

10. 296 U.S. 10 (1935)

11. Florida Coastal Mapping Act of 1974, Ch. 74-56, Fla. Laws 34

12. 389 U.S. 290 (1967)

13. State ex rel. Thornton vs. Hays, 462 P2d 671 (1969)

14. Ore. Rev. Stat. Section 390.630 (1971)

15. Supra n. 4

16. Supra n. 4

17. 375 S. W. 2d 923 (1964); See also supra, n. 5

18. Berger "Nice Guys Finish Last - At Least They Lose Their Property;"
Gion vs. City of Santa Cruz 8 Cal. Western L. Rev. 75 (1976).

19. Tex. Stat. Ann. Sec. 5415(d) (Vernon Supp. 1972)

20. V.I. Code Ann. Tit. 12, Sec. 401 (Supp 1978)
See U.S.A. vs. St. Thomas Beach Resorts, Inc., 286 F. Supp. 769
(D.V.I. 1974)

21. Fla. Stat. Sec. 161.011-.211 (Supp. 1979)

22. 99 A.207 (1953)

23. 14 RI 566 (1884)

24. Fd. 567

25. 160 A. 466 (1932) See also Daniels vs. Almy 27A. 330 (1893)

26. Union Company vs. Peckham 12 RI 130 (1888)

27. Allen vs. Allen, 32A. 166 (1895)
Nugent vs. Vallone, 161 A.2d 802 (1960)
Narragansett Real Estate Co. vs. Mackenzie, 82 A. 904 (1912)

28. 21 A. 2d 554 (1941)

29. See Allen vs. Allen 19RI 114 (1895)
Carr vs. Caprenter 22 RI 528 (1901)

30. Based on Jackvony's reliance on the dictum in
Clark vs. Peckham, 10 RI 35, at 38 (1871)

31. U.S. Const. Amend. V;
RI Const. Art. I, Sec. 16

32. Supra n. 12

33. Angell on Tidewaters 192 (1847)

34. Borough of Neptune City vs. Borough of Avon-by-the-Sea
294 A2d 47 (1972)

35. VanNess vs. Borough of Deal, 393 A2d 571 at 573 (1978)

36. Asuini vs. City of Cranston, 264 A2d 910 (1970)

APPENDIX A

STATE OF RHODE ISLAND, SC.

79H 6171 SUB A

IN GENERAL ASSEMBLY

January Session, A.D., 1979

HOUSE RESOLUTION

CREATING A SPECIAL HOUSE COMMISSION TO STUDY LATERAL ACCESS ALONG THE SHORELINE OF RHODE ISLAND.

RESOLVED, That a special house commission be and the same is hereby created consisting of five (5) members, to be appointed by the speaker: one (1) of whom shall be the chairman of the coastal resources management council, or his designee, who shall serve as chairman of the commission; one (1) of whom shall be the chairman of the general assembly's joint committee on the environment, or his designee; one (1) of whom shall be a representative of the Rhode Island league of cities and towns; one (1) of whom shall be a representative of the Rhode Island mobile sports fishermen and one (1) of whom shall be a representative of the Rhode Island sports fishermen's league; and whose purpose it shall be to study the entire subject of lateral access along the shoreline of Rhode Island.

Forthwith upon the passage of this resolution, the members of the commission shall meet at the call of the chairman. Vacancies on said commission shall be filled in like manner as the original appointments.

The membership of said commission shall receive no compensation for their services.

All departments and agencies of the state shall furnish such advice and information, documentary and otherwise, to said commission and its agents as is deemed necessary or desirable by the commission to facilitate the purposes of this resolution.

RESOLVED, That the commission shall report its findings and recommendations to the honorable house of representatives on or before March 4, 1980.